IN THE SUPREME COURT
of the United States

TERM, 365

IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN, Personal Representatives of dependents of deceased seaman, to recover damages for their wrongful death.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

WM. P. LORD and BEN ANDERSON,
317 S. W. Alder, Portland, Ore.
and
JAMES W. MIFFLIN,
107 County-City Bldg., Seattle, Wn.
Attorneys for Petitioners.

WHITTEMORE AND TRUSCOTT
and
ARTHUR L. HAUGAN,
Dexter Horton Bldg., Seattle, Wn.
Attorneys for Respondents.

SUBJECT INDEX

Page

Statement 4
Argument 5
Point I 5
Point II 22
Point III 26
Point IV 32
Costs 32
Conclusion 32

TABLE OF STATUTES CITED

Chap. 685, U.S.C. 1939, Pamphlet No. 10, pp. 1491-2 26
Federal Employers Liability Act, 45 U.S.C.A. 51 5
Merchant Marine Act of 1920, U.S.C.A. 688..... 5

TABLE OF TEXTS CITED

16 American Jurisprudence, pp. 184, 185..... 8
Beal, Conflict of Law, Vol. II, Sec. 396.1, pp. 1313, 1315 9
Benedict on Admiralty, 6th Ed., Vol. 3, Sec. 539, p. 626 26
Goodrich, Conflict of Laws, p. 213..... 8
31 Harvard Law Review, p. 1161..... 8
Stumberg, Principles of Conflict of Laws, 176...8, 9

TABLE OF CASES CITED

Page

Ahlquist v. Alaska Packers Assn., 39 F. (2d) 348 ..... 5, 6
American R. Co. v. Birch, 224 U.S. 547 26
Balt S. S. Co. v. Phillips, 274 U.S. 231 20
Brooks v. S. P. Co., 148 F. 986 9
Brown v. Boston & M. R. Co., 283 Mass. 192, 186 N.E. 59 9
Canfield v. Scripps, (Cal.) 59 P. (2d) 1040 20
Chicago, B. & Q. R. Co. v. Wells-Dickey Co., 275 U.S. 161, 163 16
Chicago etc. R. Co. v. Schendel, 270 U.S. 611 20
DeMattei v. Missouri etc. R. Co., 139 S.W. (2d) 504 ..... 8, 15
Dennick v. Central R. Co. of N. J., 103 U.S. 11 .. 17
Dietel v. Gleason, 22 F. Supp. 355 ..... 9, 27
Domenico v. Alaska Packers Assn., 112 F. 554 .. 5, 6
Duehay v. Acacia Mutual Life Ins. Co., 105 F. (2d) 768 24
Gulf, C. & S. F. R. Co. v. McGinnis, 228 U.S. 173 .. 16
Gulf M. & N. Co. v. Wood, 289 U.S. 759 ..... 8, 14, 17
Kirincich v. Standard D. Co., 27 F. Supp. 219 ... 8, 9
Lindgren v. U. S., 281 U.S. 45 ..... 5, 7, 14, 16
Missouri etc. R. Co. v. Wulf, 226 U.S. 570 ..... 26, 30
Pan Two 26 F. Supp. 990 ..... 8, 12, 15
Pearson v. Norfolk etc. Co., 286 F. 429 ..... 8, 10
Reading Co. v. Koons, 271 U.S. 58 16
Rejsenhoff v. Colonial Nav. Co., 35 F. Supp. 577 ..... 9, 27
Rose v. Phillips Packing Co., 21 F. Supp. 485 .. 8, 12
Sandanger v. Carlile Packing Co., 259 U.S. 255 .. 5, 6
Shaw v. Chicago etc. R. Co., 282 S.W. 416 ..... 8, 10
Southern R. Co. v. Stewart, 115 F. (2d) 521 ... 5, 16
U. S. v. Powell, 93 F. (2d) 788 ..... 26, 31
Wells v. Davis, 261 S.W. 58 ..... 8, 10, 17

IN THE SUPREME COURT
of the United States

..... TERM, ...

IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN, Personal Representatives of dependents of deceased seamen, to recover damages for their wrongful death.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

I.
THE OPINIONS OF COURTS BELOW

The opinion of the U. S. District Court for the District of Washington, Northern Division, has not been reported. It appears on page 3 of the Petition for Certiorari; the opinion of the U. S. Court of Appeals is printed in the Transcript, on page 5 of the Petition and in 127 F. (2d) 648.

II.
JURISDICTION

The date of the decree of the U. S. Circuit Court of Appeals for the Ninth Circuit is April 22, 1942.

Letters addressed to the clerk regarding terms of the decree of the Court of Appeals, dated April 29, 1942; Motion for reconsideration of decree of Court of Appeals and mandate filed May 22, 1942; Order of court denying same entered June 2, 1922; Petition for Writ of Certiorari filed by clerk of the United States Supreme Court on August 21, 1942.

Jurisdiction of this Court is invoked under Sections 347, 350, Ttitle 28, U.S.C.A. and Bowen v. Loperena, 311 U.S. 262.

III.
STATEMENT OF THE CASE

This has already been set forth in the Petition, pages 1 to 9, and a supplemental statement is added under the title Statement.

IV.
SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that an administrator suing under the Jones Act to recover damages for wrongful death, could not maintain such claim by the Oregon representatives in Limitation of Liability proceedings filed in the State of Washington.

2. Said Court erred in failing to direct by its mandate that the District Court of Washington permit a substitution of a Washington administrator for an Oregon administrator in the pending claims in the Limitation of Liability proceedings.

3. The Court erred in not holding that under the practice prevailing in Washington, the Oregon personal representatives were trustees and had a right to maintain the claims without ancillary proceedings.

4. The court should not have taxed costs against these petitioners in the Circuit Court of Appeals.

V.
SUMMARY OF ARGUMENT

Point I. A personal representative under the Jones Act, being a trustee to distribute the fund to statutory beneficiaries, the rule against such representative suing in a foreign jurisdiction does not apply.

Point II. Washington courts recognize the right of foreign personal representatives to sue in their courts when trustee relationship exists, and this rule should have been applied.

Point III. If the court was in doubt upon right of these Oregon administrators to maintain their claims in Limitation of Liability proceedings pending in the U. S. District Court of Washington, the Court of Appeals should have directed that a sub-

situation or amended answers and claims be filed as prayed for by Oregon administrators in the trial court.

Point IV. Taxation of Costs in the Court of Appeals was inequitable.

Point V. Conclusion

STATEMENT

Ernest Kruse, George Lee and Andrew Lee were engaged in brailing in Alaskan waters on a cannery tender named M/S Arnold, as employees of the New England Fish Company. They and other employees were employed to navigate the boat around certain fishing grounds and load it with fish taken from set-nets and bring cargo to the cannery. Suffice it to say that through claimed negligence, unseaworthiness with privity, the cannery tender was swamped and the above-named parties lost their lives.

Kruse was the cook on the tender, and it is charged that he left surviving him his widow Hazel Kruse and three minor children; that Andrew Lee was an employee on the tender, carrying no license,

and left surviving him a daughter, Marcella, aged 17, suffering from arrested development, whom he was supporting, and that George Lee was the "skipper" and his only license was that of a motorboat operator, and that he was Marcella's brother and was contributing to her support.

ARGUMENT

Point I.

A personal representative under the Jones Act, being a trustee to distribute the fund to statutory beneficiaries, the rule against such representative suing in a foreign jurisdiction does not apply.

(a) The deceased were seamen within the Merchant Marine Act.

Federal Employers' Liability Act, 45 U.S.C.A. 51.

Merchant Marine Act of 1920, U.S.C.A. 688.

Domenico v. Alaska Packers Assn., 112 F. 554.

Ahlquist v. Alaska Packers Assn., 39 F. (2d) 348.

Sandanger v. Carlile Packing Co., 259 U.S. 255.

(b) Actions for wrongful death of seamen during the course of employment are exclusively for the benefit of statutory heirs.

Federal Employers' Liability Act, 45 U.S.C.A. 51.

Lindgren v. U. S., 281 U.S. 45, 74 L. Ed. 692.

Southern R. Co. v. Stewart, 115 F. (2d) 321.

These men were seamen and their rights and liabilities are fixed by the maritime law. This was established, as far as fishing in Alaska waters was involved, as early as *Domenico v. Alaska Packers Assn.*, 112 F. 554, and likewise by *Ahlquist v. Alaska Packers Assn.*, 39 F. (2d) 348, and *Sandanger v. Carlile Packing Co.*, 259 U.S. 255, where fishermen's contracts were held to be of maritime nature.

The Jones Act (1920) is an amendment to the Seamen's Act, and is sometimes referred to as the Merchant Marine Act of 1920 (46 U.S.C.A., Sec. 688). After enlarging seamen's rights of action for damages on account of negligence, it further provides that in case of death of any seaman as result of accidental injuries, "the personal representative of such seamen may maintain an action for damages at law . . . and in such action all statutes of the United States covering or regulating the right of action for death in cases of railway employees shall be applicable. . . ."

The claims made in the limitation proceedings are under this 1920 Act for wrongful death. The statute refers to the Employers' Liability Act (45 U.S.C.A., Sec. 51 et seq.) and incorporates that Act and all rights to recover damages for wrongful death. The Employers' Liability Act grants a right of action for the benefit of the surviving widow or husband and children of such employees, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death.

The cause of action here granted for wrongful death is not for the benefit of the estates of the deceased where creditors may participate in the recovery, but it is a cause of action granted for the benefit of certain named dependents, and if these statutory heirs are non-existent, the cause of action dies. The creditors have no interest or right in any recovery that is made.

As was said in *Lindgren v. U. S.*, 281 U.S. 45, 74 L. Ed. at 692:

> ". . . since Congress by the Federal Employers' Liability Act took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws on the subject are superseded."

and again, at 693:

> ". . . it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.
>
> "It results that in the present case no resort can be had to the Virginia death statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that act."

What we are concerned with is purely a question arising solely under Federal law, and not rights accruing under any state law. In other words, the owners of the M/S O. M. ARNOLD have filed a petition for the limitation of and exoneration from liability, in which they allege that an Oregon corporation is

the owner of the lost vessel. They allege their right to file the petition because claims are pending against them. These claims are all claims for wrongful death accruing to the heirs residing in the State of Oregon, but the laws of no state have any bearing on the question. Every right and every claim of right, every procedural question and every rule of evidence is a Federal rule. So we come to the question propounded.

A personal representative may sue in a foreign jurisdiction for the benefit of statutory heirs under the Jones Act. An ancillary administration is not necessary.

Stumberg, Principles of Conflict of Laws, 176.

Goodrich, Conflict of Laws, p. 213.

31 Harvard Law Review, p. 1161.

16 American Jurisprudence, pp. 184, 185.

Pan Two, 26 F. Sup. 990, 1939 AMC 501.

Gulf M. & N. R. Co. v. Wood, 164 Miss. 765, 146 S. 298; (cert. denied 289 U.S. 759, 77 L. Ed. 1502).

Kirincich v. Standard D. Co., 27 F. Supp. 219.

Pearson v. Norfolk Etc. R. Co., 286 F. 429.

Rose v. Phillips Packing Co., 21 F. Sup. 485.

DeMattei v. Missouri etc. R. Co., 139 S.W. (2d) 504.

Wells v. Davis, 303 Mo. 388; 261 S.W. 58.

Shaw v. Chicago etc. R. Co., 314 Mo. 123, 282 S.W. 416.

CONTRA:

Beal, Conflict of Law, Vol. II, Sec. 396.1, pp. 1313, 1315.

Brooks v. S. P. Co., 148 F. 986.

Brown v. Boston & M. R. R. Co., 283 Mass. 192, 186 N.E. 59.

Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577.

Dietel v. Gleason, 22 F. Supp. 355.

Stumberg in his work *Principles of Conflict of Laws*, page 176, sums up this rule as follows:

> "There is a fundamental difference between suit by an administrator as representative of an estate, and an action for wrongful death. In actions for wrongful death he is suing not to recover an asset of the estate which is subject to the claims of local creditors, but as a statutory trustee to recover a sum for the benefit of certain named beneficiaries who alone have a legal interest. Since these beneficiaries are ultimately entitled to the fund, recovered, no harm can be done by permitting any administrator to sue in any state where the defendant can be served with process. Such a practice might avoid considerable useless expense and annoyance."

In some states there is an express statutory prohibition against a foreign personal representative maintaining an action, and in other states the right to maintain such action upon the filing of a certified copy of the appointment is recognized. *See Kirincich v. Standard D. Co.*, 27 F. Supp. 219 (Reversed on other grounds, 112 F. (2d) 163).

But such statutory restrictions have been held not to apply where the administrator is suing for the benefit of surviving heirs, under the Federal Employers' Liability Act.

> Wells v. Davis, 303 Mo. 388; 261 S.W. 58.
>
> Shaw v. Chicago etc. R. Co., 314 Mo. 123, 282 S.W. 416.

The Federal courts have sanctioned foreign administrators bringing suits in other jurisdictions to recover for wrongful death. For instance, in *Pearson v. Norfolk etc. R. Co.* (1923) 286 F. 429, one Pearson, an employee, was killed in West Virginia. An administrator alleged to be a citizen of North Carolina brought action against the employer, a Virginia corporation, in the U. S. District Court of Virginia, without taking out an administration on Pearson's estate in Virginia. The court comments that there is no statute giving a foreign representative the right to sue in Virginia, and the rule that a foreign representative may not sue in the courts of Virginia to recover assets of this decedent's estate for administration remains in full force. The court says:

> "However, I can think of no reason why this rule should apply to the case at bar. The only even passably good reason for the rule is the protection of possible local creditors of a decedent."

The court goes on then and considers the reasons for this rule and holds that it cannot apply in

a case where the recovery for wrongful death goes to statutory beneficiaries. The court says:

> "The reason that the rule in question cannot possibly apply here is that, by the express terms of the West Virginia wrongful death statute, no creditor of the deceased as such has the slightest interest in or right to the recovery sought by the plaintiff at bar. The foreign administrator here sues to recover a fund which is not to be administered, but is merely to be distributed. When the reason for a rule fails, the rule ceases to apply. And it follows that there is no reason to be found in the policy of the law of Virginia why the plaintiff here may not maintain this action."
>
> * * * * *
>
> "There are many decisions which support the conclusion which I reach, but which are based on the theory that the foreign representative is permitted to sue because he is a 'statutory trustee' (17 Corpus Juris, p. 1266, No. 117, notes 28 and 29); or because the foreign grant of letters merely 'serves to designate the person who may sue.' (McCarty v. New York etc. Co. (CC) 62 Fed. 437, 438). I find it unnecessary to quarrel with the reasoning of these cases. But it seems to me simpler and rather more satisfactory to say that the foreign administrator here may sue because there is no reason for denying him such right. . . .
>
> "It is argued that 'foreign letters have no extra-territorial effect.' This, with deference, seems to me to be an incomplete, and therefore a misleading statement of a sound rule. The meaning of the rule is merely that the local courts will not give such effect to a foreign grant of letters as to permit local assets of a decedent to be administered according to a foreign representative to have a recovery which is not to be administered at all is not giving

> extra-territorial effect to the plaintiff's letters within the meaning of the rule in question. A rule designed only to prevent foreign administration of local assets of a decedent can not properly be applied to assets of living people which are not to be administered at all."

Again, in *Rose v. Phillips Packing Co.*, 21 F. Sup. 485, one Nola Rose, administratrix of the estate of her deceased infant son, brought action against the packing company, and predicated jurisdiction in the U. S. Courts on diversity. The action was brought in the U. S. District Court of Maryland by a Virginia administratrix, and the defendant was a Maryland corporation. The complaint was demurred to on the ground that the suit in Maryland may not be maintained by a foreign administrator. Judge Chesnut held, at page 488:

> "It is indeed a very general rule that a personal representative appointed in one state is without authority to maintain a suit in another state. An underlying reason for this rule is to protect local creditors; but the rule should have no proper application to a case where the personal representative really sues in the capacity of a trustee for dependents or a preferred class of relatives as in the present case. . . . ."

Pan Two, 26 F. Sup. 990, 1939 AMC 501 was a libel in admiralty, brought by the administrator of a deceased seaman to recover damages for his wrongful death. It was alleged in the libel that one Melvin was employed as a deckhand on the tug Pan Two, owned by the respondent, and that he was drowned in the State of Louisiana when the tug sank as

result of negligent navigation. The respondent had a substantial place of business in Balitmore city, and a libel in personam was filed there under the Jones Act. The administrator was appointed by a probate court of Ohio, and there was no probate of the estate in Maryland, or proceedings in any court of Maryland to administer upon the estate. The case is very carefully considered and seems to involve the precise question presented here. The court states the question thus:

> "The respondent's legal objection to the maintenance of the suit by the Ohio administrator is put on the familiar principle that ordinarily an executor or administrator has no extra-territorial powers beyond the State where he is appointed, and therefore may not maintain suits in the Courts of other States or of the United States outside of that jurisdiction. Johnson v. Powers, 139 U.S. 156; Wright v. Gilbert 51 Md. 152."

and continues:

> "This general principle of the common law has, I think, no proper application to the particular case because the administrator is here suing not as a common law administrator for the purpose of collecting and distributing assets of the decedent, but in the capacity of a trustee for a preferred class of relatives. So much was in effect said by the Supreme Court in Lindgren v. U. S., 281 U.S. 38, 41, 1930 A.M.C. 399, affirming the decision of the Fourth Circuit, 1928 A.M.C. 1752, 27 F. (2d) 725:

In conclusion, the court said:

> "In giving the right of action to the personal representative without further description, Congress evidently intended to confer the right

> upon the lawfully and properly appointed executor and administrator of the decedent. Briggs v. Walker, 171 U.S. 466; but for the purpose of the suit he must be regarded as a trustee rather than as an executor or administrator. Although the title to the recovery is vested in him, he is not the real beneficiary of the suit but in this respect merely a nominal party holding title for the benefit of the decedent's dependents as prescribed by the statute. His authority to maintain the suit does not derive from laws of the State of his appointment as an executor or administrator but is a Federal statutory right and power given to carry out the policy of the Federal statutes. In this respect, therefore, the extent of his authority is not limited to the confines of the State where he was appointed but is co-extensive with general Federal jurisdiction, subject of course to the applicable Act of Congress as to the proper venue. . . . ."

There are several state decisions upholding the right of an administrator suing for the benefit of statutory heirs to maintain an action in another jurisdiction under the Federal Railway Employers' Liability Act. The Mississippi Supreme Court came to this conclusion without resort to another precedent than the *Lindgren* case *infra*. A certiorari was taken to this Court on this point, and Writ was denied, (*Gulf M. & N. R. Co. v. Wood*, 289 U.S. 759, 77 L.Ed.1502). Says the Supreme Court of Mississippi in this case, (164 Miss. 765, 146 So. 298):

> "Appellant railroad company has raised a point in this case that has given us far more trouble than any of the matters above mentioned; and that point is, that although the suit was brought by and in the name of the adminis-

tratrix, and although it is admitted that the administratrix was duly and legally appointed by the proper court of Madison county, Tennessee, yet it was objected by appellant and admitted by the administratrix that she had taken out no ancillary letters of administration in this state, nor had she filed the certified copy of her foreign appointment as required by section 1723, Code 1930."

* * * * *

". . . . We are of the opinion that when the plaintiff has shown, as was shown in the case, that he has been actually and legally designated as the statutory trustee by a lawful appointment as the personal representative in the state, and in and by the court of that state, having competent jurisdiction to make the appointment, then the person so appointed may sue in this state under the Federal Employers' Liability Act, and that ancillary letters or a compliance with section 1723, Code 1930, is not necessary in such a case."

This case is cited in *Pan Two*, infra, but the fact that a review was denied by the Court was not noted. Cert. denied 289 U.S. 759.

There are a number of decisions sustaining the right of a non-resident administrator to sue on behalf of the statutory heirs. The case of *DeMattei v. Missouri etc. R. Co.*, 345 Mo. 1136, 139 S.W. (2d) 504, which recites a number of authorities not referred to in *Pan Two* (26 F. Sup. 990, already cited). This case directly holds that an administrator, where he sues for the benefit of an heir or class of heirs, may maintain a suit to recover for wrongful death outside of the jurisdiction of the state where the ap-

pointment was made and without any ancillary proceedings. The court cites texts to which we have not referred and which hold that the great majority of cases sustain this right.

Claimants did not file their claims in the limitation proceedings in the Federal District Court in the State of Washington by virtue of their inherent right as the representative of the estates of the deceased seamen, but by virtue of designation by the Federal statute as trustees for designated dependent survivors of the decedents, and for them alone.

> Chicago, B. & Q. R. Co. v. Wells-Dickey Co., 275 U.S. 161, 163; 72 L. Ed. 216.
>
> Lindgren v. U. S., 281 U.S. 38, 74 L. Ed. 686.
>
> Reading Co. v. Koons, 271 U.S. 58; 70 L. Ed. 835.
>
> Gulf, C. & S. F. R. Co. v. McGinnis, 228 U.S. 173, 175-176; 57 L. Ed. 785.
>
> Southern R. Co. v. Stewart, (8th Cir.) 115 F. (2d) 317, 321.

Any recovery by them in such action does not become a part of the assets of the deceased's estate, is not subject to deceased's debts, and is not to be distributed under any statutes of descents and distributions (authorities just above cited; Taylor v. Taylor, 232 U.S. 363, 58 L. Ed. 638). By reason of these facts it has been clearly and unequivocally held that an administrator or executor may bring and maintain an action under the Federal Employers' Liability Act in any of the courts given jurisdiction over

such actions by section 6 of the act, even though such courts be outside the jurisdiction from which they derived their appointment as such administratrix or administrators. (Gulf, M. & N. R. Co. v. Wood, 16 4Miss. 765, 776-778, 146 S. 298, certiorari denied, 289 U.S. 759, 77 L. Ed. 1502; Wells v. Davis, 303 Mo. 388, 397-405, 261 S.W. 58, 59-62. Compare, also, Dennick v. Central R. Co. of N. J., 103 U.S. 11, 26 L. Ed. 439.) (Excerpt from appellee's brief, Southern Railway Co. v. Painter, 86 L. Ed. 123.)

It is therefore established that the beneficiaries are the real parties in interest and that the administrator in an action for wrongful death is only a nominal party, and that he may maintain an action in a foreign jurisdiction to recover damages for the wrongful death of the deceased seaman for the dependant heirs without probating the estate in the foreign jurisdiction.

When the district court came to a contrary conclusion on what was termed a local practice, a decree was presented dismissing the claims. When this decree was presented the time for filing claims for the heirs in the Limitation proceedings had expired, but the right of action for wrongful death had not expired and would not for one year. No other claims had been filed in the Limitation proceedings. Counsel for claimants thereupon filed with the court objections to the form of decree presented, and moved the court to amend the decree by permitting a substitution of administrators to be appointed by

the Washington courts, and to strike out that portion of the proposed decree dismissing the claims with costs. The Court denied this application and entered a decree reciting "it is therefore further ordered, adjudged and decreed that the aforesaid claims and each of them be and they hereby are dismissed, with costs to the Petitioners."

The purpose of this application was of course to protect the claims of the beneficiaries as being filed within the time fixed in the order within which to file such claims, and to remove from the decree the element of an adjudication of the claims, or otherwise stated, the right of action of the claimants as far as the beneficiaries were concerned were adjudicated if the administrator was only a nominal party. Claimants now found themselves in a position where their claims were *res judicata,* and if not, then their claims were late in the limitation proceedings, and their right to file them in such proceedings were entirely discretionary with the court. There was nothing else for them to do but appeal, which was done.

It was pointed out to the Court of Appeals that under the ruling of the Schendel case (270 U.S. 611), the order dismissing the claims was clearly *res judicata,* and any further pressing of claims in the limitation proceedings would be an entirely independent claim, and the filing of the claim would be out of time and rest in the discretion of the court, and the terms of the decree gave rise to the defense of *res*

judicata and made that defense good. It was urged (1) that the court hold that the Oregon administrator could maintain the claims in the Washington limitation proceedings, or (2) in the alternative, direct that administrators be applied for in Washington, and that they be substituted when appointed, or (3) that the claims of the Washington administrators be filed *nunc pro tunc* as of the date fixed for filing in such order in the Limitation proceeding, (4) that the District Court should be peremptorily instructed to permit a substitution of the Oregon administrators; (5) if there was to be a dismissal it should be without prejudice to the right to file claims; (6) that costs, with a penalty, should be imposed for compelling an unnecessary appeal when the rights of the claimants could have been protected by an order as prayed for by claimants.

The Court of Appeals affirmed the decree with the observation:

> ". . . While it seems clear that the order would not prevent other parties from filing claims (that is personal representatives appointed in Washington). . . ."

and then proceeded to say "we see no reason why the order appealed from could not state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington."

Within the time fixed by Rule 25 of the Court of Appeals for filing for rehearing application was made that the decision or order of the Court of

Appeals should specifically provide for a substitution or make other provision fixing the rights of the claimants so their claims would not be out of time in the limitation proceedings.

The Court denied this motion, which placed the claimants' rights to maintain their claims wholly in the discretion of the trial court with a decree outstanding that the claims filed by the Oregon administrator as dismissed. In the Application of the Court of Appeals the decisions of Dietel and Rejsenhoff, supra, were called to the Court's attention, which cited Wulf and Birch cases as to the right of substitution. In the absence of a protective order the beneficiaries are placed in precarious position, and their rights are materially affected. That the beneficiaries had fixed their rights by pressing their claims by the Oregon admnistrators in theWashington Limitation proceeding and the phrasing of the Trial Court's decree of dismissal was a final decree and was *res judicata* in any subsequent proceeding by a Washington personal representative is clearly established by the ruling of this Court in Chicago etc. R. Co. v. Schendel, 270 U.S. 611, Balt., S. S. Co. v. Phillips, 274 U.S. 231 and State Court Decisions (Canfield v. Scripps, .. Cal. .., 59 Pac. (2d) 1040. In the Schendel case the widow of one Hope brought action to recover damages for his wrongful death under the Federal Employers' Liability Act in the State of Minnesota. The Railway shortly afterwards instituted proceedings under the Iowa Workmen's Compensation Act to establish the rights of the

parties under that Act. The widow was made a party. The proceedings went to judgment in a court of Iowa which became final. The Railway company in the Minnesota case then plead the Iowa court judgment as a bar. The Minnesota court rejected the plea on the ground that there was a lack of identity of parties since under the Iowa statute the right of recovery is in the beneficiary while under the Federal act the right is in the personal representative. In the Iowa proceedings it was determined that Hope was employed in intrastate commerce in the Minnesota action the court rejected the plea of *res judicata* of the Iowa judgment and held that Hope was engaged in interstate commerce and the causes of action were different. This Court held that the plea was good.

> "Hope's death as the result of negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the Federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident. In either case, the controlling question is precisely the same, namely, Was the deceased engaged in intrastate or interstate commerce? and the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded, under the state law, was the widow, and, under the Federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as

> a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been conclusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for, if, in legal contemplation, there is identity of parties in the one situation, there must be like identity in the other."

It is very clear from these precedents that the Oregon administrators are trustees, rather than common-law administrators, and the decree of dismissal sustaining exceptions "decreed that the aforesaid claims and each of them be and they are hereby dismissed with costs to the petitioners," and that an adjudication was made on the merits of the claim and the ruling became res judicata on any further claims, if the dependents would be permitted to *file* any further claims.

Point II.

Washington courts recognize the right of foreign personal representatives to sue in their courts when trustee relationship exists, and this rule should have been applied.

The trial court found that the right of a foreign administrator in the Washington limitation proceed-

ings was governed by what was termed an established rule of the Court. (The Princess Sophia, 35 F. (2d) 736). In the Princess Sophia case any cause of action for wrongful death was under a territorial statute which vested part of the recovery in the heir and part of the recovery in the administrator for the benefit of creditors of the deceased, and many of the claims had expired at the time the application was made. Consequenly there was no basis upon which to allow the claims to be filed. The application to the trial court was to permit the filing of claims of Alaska administrators *nunc pro tunc* when the very cause of action on the claims had completely outlawed, or to file a substitution after the time limit for maintaining the claims had expired. The Court of Appeals in its opinion (61 F. (2d) 354), affirmed the refusal.

In this case the claims had not outlawed. Furtheremore, there was another very good reason why administrators appointed in Alaska for the purpose of maintaining an action for wrongful death should not be permitted in the Limitation proceeding filed in the U. S. District Court to make a substitution, and this was that under the Alaska death statute in force at the time (Oct. 24, 1918), being Sec. 1185 of the Alaska code, the recovery was divided between the heirs and the creditors. Under all of the authorities any recovery made was subject to debts of the deceased in the State of Washington, and there

was no administrator to protext such creditors, also other creditors in the limitation would be prejudiced. Here there are no other creditors. Furthermore, the claims for wrongful death were made under a state law. Here they are made under a federal law. The claims being made under a federal statute in an admiralty court, it would follow that the procedure outlined in federal decisions would control. The claimants were in court.

The purpose of an ancillary administration is to protect creditors, but in a claim such as is made by the dependents of these deceased seamen, no protection is necessary. See Duehay v. Acacia Mutual Life Ins. Co., 105 F. (2d) 768, at 771. Any recovery that the administrators made for these dependents could not be subjected to the claims of creditors. Ancillary proceedings were therefore unnecessary.

Proctor argued the right by these dependents to file a claim in the Limitation proceedings in the manner in which their appearance is made is a matter of local practice. He referred to Section 1457, Remington's Revised Statutes, and says that the statute "disqualifies non-residents of the State to act therein as administrators." He cites In re Gross's Estate, 73 Wash. 330, and In re Rowley's Estate, 178 Wash. 460, both of which are in harmony with the usual rule that personal representatives in one state have no authority to maintain action in another state, and he then cites Erie R. Co. v. Tompkins, 304 U.S. 84 and the Princess Sophia

as controlling the question of practice. But the Washington statute referred to, as well as the decisions, are concerned only with the maintenance of actions to recover debts by foreign administrator and unliquidated claims which are subject to be administered or are administered by the courts in Washington, and not to rights claimed under a federal statute.

The rule adopted in the Washington courts in regard to this matter is not quite so rigid and unyielding as proctor contends. In Doe v. Tenino Coal Co., 43 Wash. 523, 86 P. 988, it was contended that a California executor had no right to maintain an action in Washington to recover possession of personal property, but the court held that the plaintiff was a trustee under the will and therefore the rule did not apply, and here the Oregon administrators are trustees under all the decisions and if local practice is to control it would seem the Doe case should be followed. A more recent Washington decision affirms this rule.

This was subsequently confirmed when a Washington administratrix was appointed and application on behalf of the dependents was made to confirm the filing of claims by her in the Limitation proceedings, which was rejected by the District Court.

A Washington administratrix was appointed to file claims in the Limitation proceedings on July 21, 1942 on behalf of the dependents. A motion to quash

the filing of the claims was filed and the Court indicated that it would sustain the motion on the grounds that the claims were filed out of time, and on the grounds that the Court had lost jurisdiction of the claims. The Court thus interpreted the decision of the Court of Appeals to leave the District Court with a free hand to permit or reject the filing of claims in the Limitation proceedings on account of being out of time.

Point III.

If the court was in doubt upon right of these Oregon administrators to maintain their claims in Limitation of Liability proceedings pending in the U. S. District Court of Washington, the Court of Appeals should have directed that a substitution or amended answers and claims be filed as prayed for by Oregon administrators in the trial court.

The District and Circuit Court of Appeals should have allowed an amendment applied for substituting a Washington administrator in the pending claims.

Chap. 685, U.S.C. 1939, Pamphlet No. 10, pp. 1491-92.

Benedict on Admiralty, 6th Ed., Vol. 3, Sec. 539, p. 626.

Missouri etc. R. Co. v. Wulf, 226 U.S. 570.

U. S. v. Powell, 93 F. (2d) 788, 790, 791.

American R. Co. v. Birch, 224 U.S. 547.

Resjenhoff v. Colonial Nav. Co., 35 F. Supp. 577.

Dietel v. Gleason, 22 F. Supp. 355.

A proposed decree was served on proctors for claimants which was lodged with the clerk and notice given of the time and place of the signing and entering of the decree. Objections were filed (1) that the decree should be in the form of an order providing that the claimants have the right to amend by substituting an administrator appointed by the courts of Washington, and that they be allowed ten days time within which to secure the appointment of a Washington administrator, and it was further moved that the portion of the decree dismissing the claims with costs be stricken out from the proposed order. The matter was argued and the court overruled the objections and denied the request for substitution and amendment. Claimants now were in the position that their claims had been dismissed and they were out of time in the limitation of proceedings for filing their claims, and the denial of the right to substitute indicated that the court did not intend to permit the filing of claims by Washington administrators out of time. Claimants could place no other construction upon the rulings on argument or the objections.

The Court of Appeals sustained the trial court's order and made it obvious that it did not see how the ruling could be construed as *res judicata* as to Washington administrators, but modified the trial court's decree so that the order of the trial court

should provide that the dismissal was without prejudice to the filing of claims by representatives in Washington. It will be noticed that in claimant's letter of April 27th an inquiry was made as to whether the order of the Court of Appeals was to permit a substitution or the filing of new claims. This was referred to by counsel for petitioners in which it was contended that counsel refused to believe the clear purport of the opinion and the opinion recognized that to allow a substitution would be a substitution of new parties, etc.

The time for filing a petition for rehearing under Rule 25 of the Court of Appeals would expire on the 22nd day of May. On May 18th a motion was made to grant a few days extension, but on May 20th the Court denied the request. On May 22nd an objection to taxation of costs and a request was made that the mandate should provide for the filing of amended claims in the Limitation proceedings by substituting Washington administrators, and it was said, "This was the purpose of the appeal," with the further request that the affirmance is without prejudice. The petitioners in limitation filed a resistance memorandum in which it was argued that it was never suggested that the decree of the District Court would act as *res judicata*, and further recited the issues raised by the appeal and the effect thereof. The Court on June 2, 1942, denied the request to modify the decree of the Court of Appeals as well as the motion to retax costs.

That the trial court and the Court of Appeals should have directed that a substitution should be made is clear if the Oregon administrators in these claims are trustees and federal decisions permitting such substitutions are to be followed. In the Dietel and Rejsenhoff cases the court held that in cases brought by foreign administrators the complaints would be dismissed with a right to secure the appointment of an ancillary administrator with leave to amend the complaint by filing suit through a local or ancillary administrator. If a protective provision had been expressly made by the trial court as prayed for or Court of Appeals in respect to filing late claims, or by the process of disimissing the claims with the right to amend within a given time, this would have protected claimants in respect to filing their claims within the time fixed in the Limitation proceedings, but it was very clear,—at least it was to proctors for these petitioners,—that these claims were going to be outlawed if protective provisions were not made in the trial court's decree. It was thought that a suit brought under a federal statute which had been construed by this court to permit a substitution or a change of parties in cases where the real parties in interest were before the court as they were here, as the recitals in the claim will show, would be followed.

This Court has always evinced a willingness to permit substitution of parties where a case has not been brought by the proper parties, even though the statute of limitations has run. In other words,

where the case is brought for beneficiaries and the adminstrator is only a nominal party, then this Court has said that a substitution will be allowed. The leading case on the subject is Missouri etc. R. Co. v. Wulf, 226 U.S. 570. Construing this very statute in this case a mother sued in her individual capacity under the state law to recover for the death of her son, who was a railway employee. Under the Federal act she was compelled to maintain the action in a representative capacity. She had brought her action to recover for wrongful death within two years, but after the two years a substitution was made in which she brought suit as administratrix, and it was claimed that she could not maintain this suit because it had become barred, and the court was powerless to make the substitution. The Court said:

> "It is true that under the Federal statute the plaintiff could not, although a sole beneficiary, maintain the action except as personal representative. So it was held in American R. Co. v. Birch, 224 U.S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representative might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us,—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within No. 954, Rev. Stat. U. S. Comp. Stat. 1901, p. 696.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by No. 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co., 168 U.S. 445). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefrom it related back to the beginning of the suit. . . ."

The doctrine of the Wulf case has been repeatedly reaffirmed. For instance, in a soldier's War Risk Insurance case, suit had been brought within the time fixed but had been brought by the wrong parties, and an administrator was substituted after the limitation had run, and who was the only party entitled to maintain the suit. But the parties who had brought the suit were the statutory beneficiaries, just as the Kruses and the Lee girl are the beneficiaries in this proceeding. The Court permitted the amendment and discusses the claim at some length. Inasmuch as a good deal is said in the opinion which is applicable here, we take the liberty to quote from it (U. S. v. Powell, 93 F. (2d) 788, 790, 791).

"The attitude of the Supreme Court on the question of permitting amendments of this character was well stated in the recent case of U. S. v. Memphis Cotton Oil Co., 288 U.S. 62, 63, as follows: 'It has fixed the limits of amendment with increasing liberality. A change of the legal theory of the action, a departure from law to law, has at times been offered as a test. Union P. R. Co. v. Wyler, 158 U.S. 285, 295. Later decisions have made it clear that this test is no longer accepted as one of general validity. . . ."

Point IV.

Taxation of costs in the Court of Appeals was inequitable.

Costs

The taxation of costs in this case is oppressive in view of the fact that petitioners in limitation have not been put to any disadvantage. They opposed and resisted the motion to substitute in the trial court, and likewise they resisted the application to change the decree from a dismissal of the claims, which placed claimants in a very serious predicament. The court's decree does not recite that the case was dismissed for want of capacity to sue, but the claims are affirmatively dismissed. Likewise it seems the resistance to the proposed substitution was uncalled for. If the reservation was not there when new claims were filed it could be contended that such claims were not only res judicata but the court had already determined that the late claims would not be entertained. In the face of this situation, costs were taxed against the claimants.

Point V.

CONCLUSION

It is therefore respectfully submitted that not only on account of the importance to the petitioners herein that their rights be preserved, and also that this case is one calling for the exercise by this Court

of its supervisory powers in order that the question herein involved may be permanently settled by this Court, and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit, and the District Court, and enter a decree herein, either that the Oregon administrators were proper parties in the Limitation proceedings, or that petitioners' rights be conserved by permitting a substitution, as prayed for in the District Court and Court of Appeals.

Respectfully submitted,

BEN ANDERSON,
WM. P. LORD,
JAMES W. MIFFLIN,
Proctors for Petitioners herein.